2012 IL App (4th) 100891-U

Filed 3/29/12

NO. 4-10-0891

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JEFFREY A. MARLOW,	)	No. 10CF170
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Where, in the trial court, defendant did not raise the specific objection to the admissibility of documents relating to pseudoephedrine purchases he now raises on appeal and the record does not clearly show the trial court addressed the issue on its own, defendant forfeited his sole argument on appeal, and plain-error review is not appropriate since defendant did not request it.

¶ 2 After an August 2010 trial, a jury found defendant, Jeffrey A. Marlow, guilty of delivery of methamphetamine and methamphetamine conspiracy. In October 2010, defendant filed a motion for acquittal notwithstanding the verdict or, in the alternative, for a new trial, arguing, *inter alia*, the admission of computer records that stated information regarding pseudoephedrine purchases was erroneous. At a joint October 2010 hearing, the Coles County circuit court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 5 years for delivery of methamphetamine and 16 years for methamphetamine conspiracy.

¶ 3 Defendant appeals, asserting the State failed to establish a foundation for the admission of computerized records that purportedly established the alleged coconspirators purchased medication containing pseudoephedrine. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2010, the State charged defendant with one count of unlawful possession of a methamphetamine precursor (720 ILCS 646/20(a)(1) (West 2010)) (count I) and one count of methamphetamine conspiracy (720 ILCS 646/65(a) (West 2010)) (count II), which was later amended. In June 2010, the State added an additional charge of unlawful delivery of methamphetamine (720 ILCS 646/55(a)(1) (West 2010)) (count III) based on defendant's actions in April 2010. On August 18, 2010, the State sought dismissal of counts I and II and brought another methamphetamine-conspiracy charge (720 ILCS 646/65(a) (West 2010)) (count IV) based on (1) defendant's actions from around February 2010 to May 2010 and (2) possession of 15 grams or more but less than 30 grams of a substance containing pseudoephedrine, a methamphetamine precursor.

¶ 6 On August 24, 2010, the trial court commenced a jury trial on counts III and IV. The testimony and discussions relevant to the issue on appeal are as follows.

¶ 7 On the first day of trial, the State presented the testimony of Carl Carter, Jr., one of the alleged coconspirators. When the State sought to ask Carter about the first of five documents (State's exhibit Nos. 1 through 5) from various pharmacies that showed his purchase of a substance containing pseudoephedrine, defense counsel requested a side bar. (The State had a total of 12 such documents from pharmacies, which were its exhibits Nos. 1 through 12. Hereinafter, exhibits Nos. 1 through 12 are referred to as the pharmacy documents.) Except for

Carter's identification of his signature on the document, defense counsel objected to all other uses of the document because the document was hearsay and its use to show the purchased pills contained pseudoephedrine violated the confrontation clause of the sixth amendment (U.S. Const., amend VI) as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). Specifically he argued *Crawford* was violated because the witness was not qualified to give an opinion on the contents of a cold pill. The State responded it would have pharmacists testify later, and the court ruled it would have to address the objection as to a specific question. Carter verified his signature on the five documents and testified he purchased either "Sudafed-24" or "Sudafed-12" on the dates listed on the documents. On cross-examination, Carter testified he signed his name on a computer screen that did not have any writing on it. Carter could only verify his signature as accurate.

¶ 8 On the second day of trial, defense counsel again requested a side bar to address *Crawford* prior to the testimony of Jason Wagner, the pharmacist in charge at the CVS in Mattoon, Illinois. Defense counsel argued the following:

> "If Mr. Wagner is going to testify that the pills bought contained pseudoephedrine, *** unless he was there for the purchase and tested the pills, it violates *Crawford v. Washington*. It's hearsay, being introduced for the truth of the matter asserted that the pills in fact bought contained pseudoephedrine, and you can create all the business records exceptions you want, if you read *Crawford*, you create exceptions by state statute, common law. You want to have hearsay, but you can't obviate the Sixth Amendment right to con-

front witnesses."

Defense counsel asserted his client had a right to confront the manufacturer as to the pills' pseudoephedrine content. The court ruled the pharmacist would be allowed to testify over his objection if the State laid a foundation as to whether or not pseudoephedrine was contained in Sudafed. Defense counsel noted his continuing objection. Defense counsel also alleged a "second *Crawford* problem is unless he is the one that sold the pills, all he is doing is repeating a business record[], which again violates *Crawford*."

¶ 9 When the State first asked Wagner about a pharmacy document, defense counsel objected based on *Crawford*. Defense counsel raised various objections as the State attempted to lay a foundation for the pharmacy document. One argument was the witness's foundation testimony violated *Crawford* because the witness was not present at the time the pills were sold. When the State first moved for the admission of the pharmacy document (State's exhibit No. 3), defense counsel objected based on *Crawford* and the fact Carter testified the document he signed did not have any writing on it. The court sustained the objection and told the State to lay a better foundation. When the State again moved for the document's admission, defense counsel raised his previous objections, and the court admitted the exhibit. As Wagner testified to the contents of the document, defense counsel raised hearsay and firsthand-knowledge objections. When the State moved for the admission of another pharmacy document (State's exhibit No. 8), defense counsel objected it was not "a complete, accurate depiction." As to the third pharmacy document (State's exhibit No. 10), defense counsel's objection was "[a]uthenticity." Defense counsel's objection to the admission of the fourth pharmacy document (State's exhibit No. 12) was "authenticity, firsthand knowledge, and *Crawford*." For the remainder of the pharmacy docu-

ments, defense counsel simply stated he was raising the same objections he raised earlier. (We note the record indicates the State never moved to admit its exhibit No. 11.)

¶ 10 On cross-examination, Wagner testified he did not know if he was on duty the day the pills at issue were sold and had no firsthand knowledge of whether the pills that were sold actually contained pseudoephedrine. He further testified he did not set up the record keeping software and did not know if it was accurate. Wagner admitted registers sometimes ring up a price different from the shelf price. The document relied on the truthfulness of the manufacturer's label and the accuracy of the store's computer system. Wagner confirmed that, with the computer system, the purchaser of the pills signed a blank screen. On redirect, Wagner noted he had no reason to believe the records were inaccurate.

¶ 11 Marsha Turner, a pharmacist at Wal-Mart in Mattoon; Jennifer Mueller, a pharmacy manager at the CVS in Charleston, Illinois; and Randall Doisen, the store manager for the Walgreens in Mattoon, gave similar testimony to that of Wagner. At the conclusion of the second day of trial, defense counsel again asserted a *Crawford* problem existed regarding the testimony of the four witnesses who worked at pharmacies. Defense counsel argued the following:

> "They are asking—there can be business records exceptions, but not only are they—they are asking that the business records come in, that the pseudoephedrine—the State is bringing in *Crawford* violations. Is it being offered for the truth of the matter asserted? Yes. And are they accurate? Yes. And these people, can clear the hearsay objection and business records, but you can't clear

Crawford. My client is not allowed to cross-examine the manufacturer."

The court told defense counsel to find a case showing the box itself or evidence of the purchase of a box with the amount of pseudoephedrine in it stated on the box was not allowed to come into evidence without the manufacturer's testimony and it would entertain a motion to strike.

¶ 12 The transcripts for the morning of the third day of trial begin with the testimony of a witness and do not include any discussion of the admissibility of the pharmacy documents. However, the transcripts for the afternoon do begin with such a discussion. Defense counsel asserted the documents were inadmissible under section 115-5(c)(1) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-5(c)(1) (West 2010)), which excludes hospital- and medical-business records from the business-record exception to the hearsay rule. In making his argument, defense counsel noted that, in the morning, he had made an argument Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992) controlled and the documents were inadmissible under that rule. That argument and ruling are not included in the record on appeal. As to the section 115-5(c)(1) argument, the trial court disagreed with defense counsel that section applied to the records at issue. In doing so, it noted the State had laid a proper foundation showing the documents were business records made at the time of the transaction and in the regular course of business. The court did not consider the pharmacy documents medical-business records because they were required by statute for the purpose of tracking purchases and enforcing the law on the amount of pseudoephedrine that may be purchased during a period of time and did not involve any professional judgment.

¶ 13 On the fourth day of trial, after the close of all of the evidence and before the

formal jury-instruction conference, the trial court noted it had an opportunity to review some additional authority relating to the pharmacy documents and the business-record exception and had determined its ruling in allowing the records was correct. The court noted the following three rules came into play: (1) the common law, (2) the supreme court rule, and (3) the legislative rule. It found Rule 236 applied only to civil cases and thus was inapplicable in this case. As to the legislative exception, the court gave the names of two cases, which do not exist as spelled in the transcript. From the court's description of the cases, it appears the first case discussed was *People v. Lendabarker*, 215 Ill. App. 3d 540, 560, 575 N.E.2d 568, 580 (1991), where the Second District concluded section 11-501.4 of the Illinois Vehicle Code (Ill. Rev. Stat.1989, ch. 95 1/2, par. 11-501.4), which provided for the admissibility of written blood-alcohol-test results under certain conditions, did not violate a defendant's sixth-amendment right to confront witnesses. After discussing *Lendabarker*, the court noted the pharmacy records had a "sufficient indicia of reliability, with respect to the system in place at each of these stores that tracks and records, as required by state law" the information about the pseudoephedrine purchase. The second case is *People v. Morrow*, 256 Ill. App. 3d 392, 397, 628 N.E.2d 550, 554 (1993), where the First District discussed the business-record exception, the reason behind the hearsay exception, and computer-generated records. The trial court found the facts of *Morrow* were different from this case and noted the case "talks about this case of computer-generated records, a proper foundation can be laid, and the rationale behind the rule, which I believe is just helpful to me in looking at these particular records."

¶ 14 When the State requested the pharmacy documents go back to the jury, defense counsel objected because a complete document had not been shown because the pill buyers had

all testified they signed a blank screen and the pharmacy witnesses testified the documents were generated by a computer and they were not the ones that produced the document. Over defendant's objection, the court allowed the pharmacy documents to go back to the jury.

¶ 15 On August 27, 2010, the jury found defendant guilty of both charges. On October 12, 2010, defendant filed a motion for acquittal notwithstanding the verdict or, in the alternative, a new trial, arguing the State failed to prove him guilty beyond a reasonable doubt. In making his argument, defendant contended the trial court erred in admitting the pharmacy documents based on *Crawford* and section 115-5(c)(1) of the Procedure Code. As to *Crawford*, defendant argued the reliability of evidence must be assessed after it is tested with cross-examination, not based on a judge's determination.

¶ 16 On October 15, 2010, the trial court held a joint hearing on the posttrial motion and sentencing. During arguments on the motion, defense counsel again asserted the pharmacy documents were inadmissible under *Crawford* and section 115-5(c)(1). The gist of defendant's *Crawford* argument was the court improperly admitted the pharmacy documents as reliable without having reliability tested by cross-examination, which violated his sixth-amendment right to confront the evidence against him. The court denied defendant's posttrial motion. It noted the pharmacy documents were kept in the ordinary course of business and the pharmacies had a statutory duty to keep the records. The court stated, "[t]hey are clearly business records, and the issue [defense counsel] argues is are these business—are these business records of a medical business; therefore not admissible under the business record exception." The court concluded they were not medical-business records. The court also noted the following:

"I would also comment that with respect to the foundation

> for those records, there were objections made and there was an argument made somewhat by [defense counsel] that, well, even if they are business records, you need the clerk to come in and testify or someone to come in and verify that the system is set up accurately.
>
> I think those are arguments that go to the weight of the evidence and not to the admissibility of these records. I believe a foundation was properly laid under that exception. [Defense counsel] had substantial cross-examination as to accuracy, got into issues such as pricing mistakes that are made, and certainly that evidence was in front of the jury when they determined beyond a reasonable doubt that defendant was guilty of the charges."

The court sentenced defendant to concurrent prison terms of 5 years for delivery of methamphetamine and 16 years for methamphetamine conspiracy.

¶ 17 On November 8, 2010, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). Thus, this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant only challenges the trial court's admission of the pharmacy documents and specifically asserts the State failed to meet the foundational requirements that must be established for the admission of computerized-business records, which are in addition to the standard business-record requirements. This court has held a proper foundation for the

admission of computer printouts is established when the party requesting admission has shown "(1) the electronic computing equipment is recognized as standard; (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded; and (3) the foundation testimony establishes that the sources of information, method and time of preparation indicate its trustworthiness and justify its admission." *People v. Turner*, 233 Ill. App. 3d 449, 453-54, 599 N.E.2d 104, 108 (1992). We note our supreme court has vacated the First District's *People v. Universal Public Transportation, Inc.*, 401 Ill. App. 3d 179, 928 N.E.2d 85 (2010), which defendant also cites showing different additional requirements for computer-generated business records. See *People v. Universal Public Transportation, Inc.*, No. 110326, 960 N.E.2d 563 (Jan. 25, 2012) (nonprecedential supervisory order denying leave to appeal, vacating the First District's judgment, and directing the First District to reconsider its judgment in light of *People v. Gutman*, 2011 IL 110338, 959 N.E.2d 621).

¶ 20 The State contends defendant has forfeited his foundation issue by failing to raise it in the trial court and contends defendant, in fact, conceded at trial the documents were admissible under the business-record exception to the hearsay rule. Defendant responds his trial counsel strenuously contested the admissibility of the pharmacy documents. Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we first address the State's forfeiture argument

¶ 21 In *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988), our supreme court held a defendant must (1) object to an alleged error at trial *and* (2) raise the alleged error in a posttrial motion to avoid forfeiture of the issue on appeal. "This rule is

particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a *timely* and *specific* objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." (Emphases added.) *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005).

¶ 22 The record reveals defense counsel made numerous objections at defendant's trial, especially during the testimony of the four witnesses from the various pharmacies where the pseudoephedrine pills were purchased. While we agree with defendant that his trial counsel did not stipulate to or concede the admissibility of the pharmacy documents, defendant's arguments were different than the one he now makes on appeal.

¶ 23 When the State first tendered a pharmacy document, defense counsel requested a side bar and argued the State's use of the document to show the purchased pills contained pseudoephedrine violated the sixth amendment's confrontation clause as set forth in *Crawford* because the witness, who had purchased the pills, was not qualified to give an opinion on the contents of a cold pill. Next, before the first witness from a pharmacy testified, defense counsel again requested a side bar and argued *Crawford* was violated by allowing such evidence to show the purchased pills contained pseudoephedrine where the witness had not tested the pills to determine their contents. Defense counsel argued the manufacturer should have to testify. He further argued *Crawford* was also violated because the pharmacy witnesses were not the people who sold the pills, and thus they were just repeating a business record. The trial court disagreed with defense counsel, and defense counsel noted a continuing objection based on *Crawford*.

¶ 24 When the State sought to admit each of the pharmacy documents, defense counsel

objected based on *Crawford*, incomplete record, lack of authenticity, and "firsthand knowledge." In the pages cited by defendant as showing he raised a specific foundation objection, defense counsel asserted his second *Crawford* argument and contended that went to foundation. Essentially, the State was presenting an improper witness to give the foundation testimony. When cross-examining the pharmacy witnesses, defense counsel questioned them about their knowledge of the computer system's accuracy. At the conclusion of the four pharmacy witnesses' testimony, defendant again argued a *Crawford* problem existed and insisted he should be allowed to cross-examine the manufacturer about the pseudoephedrine content. Later in the proceedings, defense counsel raised an argument related to Rule 236 and asserted the documents were excluded under section 115-5(c)(1) of the Procedure Code (725 ILCS 5/115-5(c)(1) (West 2010)) as a medical-business document. Defense counsel also objected to the pharmacy documents being published to the jury because the documents were incomplete and lacked authenticity. In his posttrial motion, defendant argued the admission of the pharmacy documents was erroneous under (1) *Crawford* and (2) section 115-5(c)(1).

¶ 25 Moreover, when making his *Crawford* arguments before he invoked section 115-5(c)(1) of the Procedure Code, defense counsel did not dispute the documents were admissible under the business-record exception to the hearsay rule. For example, he stated, "you can clear the hearsay objection and business records, but you can't clear *Crawford*." The record gives no indication the State had reason to believe defendant was challenging the admissibility of the pharmacy documents based on their failure to meet the additional foundational requirements for computerized-business records at trial or in the posttrial motion as defense counsel made the choice to focus his arguments on *Crawford.* Thus, the State did not forfeit its forfeiture argument

as alleged by defendant.

¶ 26 In this case, defendant never argued the pharmacy documents failed to meet the additional requirements needed to establish a proper foundation for computerized-business records. Instead, the focus of his objections to the admission of the documents was on the State's alleged failure to present the proper witnesses to testify about the documents and pill contents under *Crawford*. He clearly did not raise the issue in his posttrial motion, which only asserted the *Crawford* and section 115-5(c)(1) claims. When ruling on the posttrial motion, the trial court even stated defendant "somewhat" argued someone had to testify the system was set up accurately as defendant raised the argument in the context of the confrontation clause as set forth in *Crawford*, not the statutory basis for admission of such records. Accordingly, defendant failed to meet both requirements of *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130, and thus did not preserve this issue for review.

¶ 27 Further, citing *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008), defendant contends forfeiture should not apply because the trial court did address the issue he now raises on appeal. In *Heider*, 231 Ill. 2d at 18, 896 N.E.2d at 249, the court concluded the defendant had preserved his claim for review and gave the following explanation:

> "There are several reasons for requiring that an objection be made first at trial in order to preserve an issue for appeal. One is that this allows the trial court an opportunity to review a defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious. [Citation.] A second reason for this requirement is to prevent a litigant from asserting on appeal an

> objection different from the one he advanced below. Our review of the record leaves us satisfied that these purposes have been met. *** In circumstances such as these, where the trial court clearly had an opportunity to review the same essential claim that was later raised on appeal, this court has held that there was no forfeiture."

¶ 28 First, this case does not involve a sentencing claim. On the contrary, it was a foundational matter, which as noted earlier, raises different concerns for the State. Thus, even if the trial court could be said to have addressed the matter, it was not until after the close of evidence, when the State had no opportunity to make any changes in its case based on what the court noted. Second, defendant never really raised the issue as his only statutory hearsay exception objection was the medical-business exception pursuant to section 115-5(c)(1). The rest of his arguments were based on *Crawford* and the fact the purchasers of the pills signed a blank screen and not the document presented.

¶ 29 Last, the record does not clearly show the trial court considered the additional requirements for the admission of computerized records. After the close of evidence, the trial court did note it had done some research and found the pharmacy documents had a sufficient indicia of reliability because they were required by State law. It also distinguished a case and noted the case discussed computer-generated records and that a proper foundation for such records could be laid. However, the court did not expressly address the additional requirements for a computerized-business record. As to the court's comments when ruling on defendant's posttrial motion, the court did address accuracy but defendant had raised the issue in the context

of his *Crawford* claims. The court's statements do not indicate it was aware of the additional foundational requirements. In fact, the court's comments suggest the contrary as it finds accuracy went to the weight of the evidence, not foundation. It appears the court's comment was based on the language of section 115-5(a) of the Procedure Code (725 ILCS 5/115-5(a) (West 2010)), which provides "[a]ll other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

¶ 30 Thus, unlike in *Heider*, the record in this case does not indicate the trial court reviewed the same essential claim raised on appeal. Accordingly, we find defendant has forfeited this issue on appeal.

¶ 31 Consequently, this court can only review defendant's claim of error if he has established plain error (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). Under the plain-error doctrine, we can "review unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Bannister*, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008). "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. Thus, "when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Hillier*, 237 Ill. 2d at 545-46, 931 N.E.2d at 1188.

¶ 32 In this case, defendant fails to present argument on how either of the two prongs of the plain-error document are satisfied. Thus, defendant has also forfeited plain-error review.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the Coles County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.